Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. LP, a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE STATE ACTION IMMUNITY DOCTRINE OF ANTITRUST LIABILITY AND ITS CASE PROGENY, *NOERR-PENNINGTON*, APPLIES WHEN THE LEGISLATORS OF A WATER DISTRICT BOARD ARE NOT MERELY SUBJECT TO A PRIVATE PARTY'S LOBBYING EFFORTS, BUT ARE THEMSELVES SUBORDINATE, PAID EMPLOYEES OF THE PRIVATE PARTIES WHO CONSPIRE TO MONOPOLIZE CONTROL OF THE BOARD'S AUTHORITY TO DISTRIBUTE AND SELL SURPLUS WATER FOR THEIR OWN BENEFIT AND TO THE DETRIMENT OF PETITIONERS AND OTHER LANDOWNERS IN THE DISTRICT?

PARTIES TO THE PROCEEDING

Petitioners in this Court are:

William Roden, as Trustee of Ernest M. Still Trust
Roden Farms, a General Partnership
Cal Farm Invest, Inc., a California corporation
Gary Hamilton, an individual
Susan Hamilton, an individual

Respondents in this Court are:

Berrenda Mesa Water District
Blackwell Land Company, Inc. a
Delaware corporation
Paramount Limited Partnership and its member
corporations

The foregoing are not all of the parties in the Courts below. Those parties who appeared in the lower court as Plaintiffs/Appellants and who are not participating in this action are as follows:

David G. Hedgecock, et al.
Santa Fe Energy Resources, Inc., a corporation
Chandler's Palos Verdes Sand and Gravel,
a corporation

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WILLIAM RODEN, as Trustee of Ernest M. Still Trust;
RODEN FARMS, a General Partnership;
CAL FARM INVEST, INC., a California corporation;
GARY HAMILTON, an individual;
SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. LP, a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, William Roden as Trustee of Ernest M. Still Trust; Roden Farms, a general partnership; Cal Farm Invest, Inc., a California corporaton; Gary Hamilton, an individual; and Susan Hamilton, an individual, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of California granting defendant's motion to dismiss is unreported and is reprinted at Appendix A. The decision of the Court of Appeals for the Ninth Circuit affirming the District Court's decision is unreported and is reprinted in Appendix B.

JURISDICTION

The jurisdiction of the United States District Court for the Eastern District of California was based upon 15 U.S.C. §§ 7, 15 and 26 (Sherman Act and Clayton Act). The final judgment of the District Court was entered July 15, 1993. A notice of appeal was filed by Petitioners on August 13, 1993. The Court of Appeals for the Ninth Circuit entered its decision affirming the District Court on April 7, 1995. The instant Petition for Certiorari is timely pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is based upon the final decision of the United States Court of Appeals for the Ninth Circuit and is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15 United States Code § 1.[1]

> **Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

[1] As amended Nov. 16, 1990, P.L. 101-588, § 4(a), 104 Stat. 2880.

with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Title 15 United States Code § 2.

Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [2]

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[2] As amended Nov. 16, 1990, P.L. 101-588, § 4(b), 104 Stat. 2880.

STATEMENT OF THE CASE

Petitioners William Roden, as Trustee of Ernest M. Still Trust; Roden Farms, a General Partnership; Cal Farm Invest, Inc.; Gary Hamilton, an individual; and Susan Hamilton, an individual, are a trustee, a general partnership, a corporation, and individuals who own or lease land in the Berrenda Mesa Water District (hereinafter "BMWD"). Respondent, BMWD, is a California Water District organized under the California Water Code. Respondent Paramount is a limited partnership, corporations which are general partners in that limited partnership, and a corporation owning land located in the BMWD. Respondent Blackwell Land Company, Inc., (hereinafter "Blackwell") is a Delaware corporation owning land in the BMWD. The BMWD is located in Kern County, California.

The BMWD was created in 1963 under the California Water Code as a member unit of the Kern County Water Agency (KCWA). The KCWA water, which is the only viable source of water for farming within BMWD, is then distributed to landowners by the BMWD. Based on the BMWD's annual supply of water each landowner within the BMWD is allotted 2.82 acre feet of water per acre. Water allocated and credited to the BMWD is based upon the number of acres within the BMWD, whether or not such land is actually farmed. To pay for the allotted water to the BMWD, landowners are assessed standby charges, ad valorem taxes and water tolls. In the event a landowner defaults on standby charges and ad valorem taxes, the BMWD has the authority to foreclose on property owned by the delinquent landowner. Upon foreclosure, the allocation of water attributed to the foreclosed land, remains within and under the control of the BMWD.

The BMWD has a Board of Directors comprised of five members, who are elected only by landowners in the BMWD. The landowners are given one vote for every dollar of assessed value of land owned within the BMWD. California Water Code §§ 34700, 35003.[3] Thus, the largest landowners receive more votes and control. Respondents, Paramount and Blackwell, as the largest landowners, have voted to install a majority, four out of five, representatives, who are paid employees of the Respondents, on the BMWD Board of Directors.

On December 31, 1992 Petitioners filed an action in District Court alleging anticompetitive activities in violation of Sections 1 and 2 of the Sherman Antitrust Act,

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[3] § 34700. Director

Each director shall be a holder of title to land within the district or the legal representative of the holder of title to land. If a corporation holds title to land, the president of the corporation or persons selected by resolution of its board of directors filed with the district may serve as directors.

§ 35003. Voters; Number of votes; Assessment book as evidence of vote entitlement; Exception

Each voter shall have one vote for each dollar's worth of land to which he or she holds title. The last equalized assessment book of the district is conclusive evidence of ownership and of the value of the land so owned except that in the event that an assessment for a district shall not have been made and levied for the year in which the election is held, the last . . . assessment roll of each affected county shall be used in lieu of the assessment book of the district *as evidence of ownership.* However, the board may determine by resolution that the assessment book or . . . assessment roll of each affected county shall be corrected to reflect, in the case of transfers of land, those persons who as of the 45th day prior to the election appear as owners on the records of the county. *If an equalized assessment book of the district does not exist, then each voter shall be entitled to cast one vote for each acre owned by the voter within the district, provided that if the voter owns less than one acre then the voter shall be entitled to one vote and any fraction shall be rounded to the nearest full acre.*

15 U.S.C. §§ 1 and 2, in that Respondents, as private parties and as de facto members of the BMWD and at their direction, are involved in a conspiracy to destroy Petitioners' businesses, to monopolize the market for water deliveries within the BMWD and to destroy competition for water by pursuing the following course of action.

In 1986 the two largest landowners within BMWD were Blackwell and Berrenda Mesa Farming. At that time, the BMWD Board of Directors through hearings, decided and unanimously affirmed that approximately one-third of the BMWD maximum annual entitlement, or 50,000 acre feet, was surplus to its long term needs and that it was in the best interest of the BMWD to sell this acre feet supply.

In early 1988, negotiations for the sale of 50,000 acre feet of annual water entitlement from BMWD to Moulton Niguel Water District began at the direction of the Board of Directors. On July 15, 1988, BMWD published a Notice of Hearing regarding the sale of surplus water for $1000.00 per acre foot, for a total sale price of $50,000,000.00. BMWD took all necessary steps to sell the water to include the filing with the state clearing house and circulation of its "Initial Study and Proposed Negative Declaration" regarding the proposed transfer.

Sometime after July, 1988, Respondent Paramount entered into negotiations with West Hills (a division of Berrenda Mesa Farming) and Respondent Blackwell for the purchase by Paramount of agricultural land in the BMWD. A critical term of these negotiations was that Paramount required assurances from these sellers that no sale of any entitlement water would take place prior to Paramount's purchase. In the course of those negotiations and secret meetings between Paramount and Blackwell, the representatives agreed to obstruct and hinder transfer of water from BMWD despite the fact that the

BMWD Board had already decided it was in the best interest of the BMWD to make that sale. On November 22, 1988, during a closed meeting of the BMWD Board of Directors, controlled by Blackwell and West Hills, they withdrew their support for the water sale. An informal vote was held and the sale of water was terminated by a 4 to 1 vote. Respondents were successful in using the government process to obstruct the sale of surplus water allocated to Petitioner and others in like positions.

In 1989, Paramount, after completing the purchases, became the largest landowner in the BMWD. Paramount then acted to install two of its own representatives on the Board, so that Paramount and Blackwell each had two of its own representatives on the Board of Directors of the BMWD and therefore controlled four of the five votes. Since that time Paramount has consistently and steadfastly acted to oppose and prevent the sale of surplus water.

In the course of this monopoly to use the government process, Respondents appointed a majority of the BMWD who were controlled solely by the anticompetitive interests of Respondents and to the detriment of the interests of the BMWD and the other members of the BMWD.

In September, 1990, the Board approved another sale of 20,000 acre feet of surplus water to Summit Valley Water District for a sale price of $20,000,000.00. The sale was opposed by the Paramount representatives. Paramount then, by using another form of government process, threatened BMWD with litigation over the proposed sale. The pressure resulted in a decision by the Board to cancel the proposed sale.

Respondents were aware that the current high cost of water supply meant that, particularly for row crop farmers, the cost of production was higher than the sales price of the crop. Thus, these farmers, including

Petitioners, could not profitably farm their land nor could they use any water from BMWD. With this knowledge, Respondents caused BMWD to impose very large standby fees, which fees continued to accrue even while the land was not being farmed and no water was being used. The imposition of these fees resulted in Respondents forcing Petitioner and those in a like position, to pay for water that was ultimately used by Respondents.

The imposition of standby fees became a governmental process tool used by Respondents to further achieve the objective of the monopoly and conspiracy to eliminate competition for the proceeds from the sale of BMWD water, and foreclose on the affected landowners, all to the exclusion of the best interest of the BMWD .

BMWD could have; and indeed planned, to sell the surplus water to other districts, thereby alleviating the need to impose any standby fees. Instead, Respondents' actions caused the imposition of fees in amounts which exceeded Petitioner's financial resources resulting in foreclosure, thus acquiring for Respondents, for greatly reduced rates, the water allocations associated with the landholdings of Petitioners.

Due to Respondents not selling excess water, Petitioners have paid hundreds of thousands of dollars in standby fees for which they have received no water, and have lost thousands of acres through foreclosure.

The conspiracy and monopoly is predicated upon Petitioners and other small farmers not being able to pay exorbitant standby charges indefinitely, along with ad valorem taxes and assessments, making foreclosure virtually inevitable, and which could be ameliorated by the sale of surplus water.

The water allocated to the land in Berrenda Mesa has more value than the land. Once competition for water

within the BMWD is eliminated, Respondents will reap massive financial benefit, and thus, should be held liable for antitrust violations as alleged in the complaint brought by the Petitioners.

Based upon State immunity as to BMWD, and upon the *Noerr-Pennington* immunity doctrine as to the private Respondents, the District Court dismissed the action. In the District Court's Memorandum Opinion, (Appendix "A"), it found that the BMWD challenged actions were state authorized and that there is a clear and express state policy to displace competition with regulation and these findings are sufficient to extend state antitrust immunity to the BMWD as a public entity performing local governmental function. As to the private actors, Paramount and Blackwell, the Court found they are not immune under the state action doctrine. However, they are protected from antitrust liability for acts intended to influence the actions of the District Board members under the *Noerr-Pennington* doctrine.

Petitioners appealed from the District Court decision, claiming that the District Court erred in that the scope of the *Noerr-Pennington* doctrine is limited and the Court's ruling is based upon an incorrect factual finding.

On April 7, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court that Respondents are immune from antitrust liability. The Appeal Court stated in their memorandum that under the California Water Code, BMWD's refusal to sell allegedly excess water, and the concomitant increase in standby charges, is a foreseeable result of the state's delegation of these powers to local water districts. The Court further stated that "Petitioner's allegations do make out a case that the Respondent landowners acted in their own self-interest in bringing about water district decisions favorable to them and detrimental to the Petitioners. However, it is beyond the scope of the

antitrust laws to identify and invalidate lobbying that has produced a selfishly motivated agreement with public officials." The Courts overlooked the fact that these public officials are on the payroll of the conspiratorial corporations and entirely under their control.

The Court of Appeals erred in extending antitrust immunity under this factual situation. This petition should be granted to resolve an important and recurring question of antitrust law.

REASONS FOR GRANTING THE PETITION

The undisputed facts disclose a violation of the Sherman Act. Certiorari should be granted for the following reasons.

This case raises, in part, the question of whether the District Court erred in dismissing Petitioner's causes of action for violation of Section 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2:

The Petition should be granted to decide an antitrust liability question under a factual situation that is without precedent. Whether the State Action Immunity Doctrine of antitrust liability and its case progeny, *Noerr-Pennington*, applies when the legislators of a water district board are not merely subject to a private party's lobbying efforts, but are themselves subordinate paid employees of the private parties who conspire to monopolize control of the board's authority to distribute and sell surplus water.

The Court of Appeals decision to affirm the District Court dismissal is in error in both of the above respects, under prevailing case law and under facts not considered in prior Supreme Court opinions.

I.

THE COURT OF APPEALS ERRED IN FINDING THAT THE STATE ACTION IMMUNITY DOCTRINE AND ITS CASE PROGENY, *NOERR-PENNINGTON* INSULATES PRIVATE DEFENDANTS WHO CONTROL THE DISTRICT'S BOARD THROUGH BOARD MEMBERS EMPLOYED BY THE PRIVATE PARTIES, FROM ANTITRUST LIABILITY FOR PREDATORY ANTICOMPETITIVE BEHAVIOR AND USING THE GOVERNMENTAL PROCESS FOR THAT MEANS.

The Court of Appeals found that Respondents, Blackwell and Paramount, as private actors, were immune under the *Noerr-Pennington* doctrine exception from federal antitrust laws. The court further found that Petitioner's allegations do make out a case that the private Respondent landowners acted in their own self-interest in bringing about water district decisions favorable to them and detrimental to the Petitioners. However, the court said it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383, 111 S.Ct. 1344 (1991). Appendix "B".

The Court erred in its statement of the law and in its application of law to fact. Lobbying is not at issue here, rather the issue is the Respondents' patent, blatant control of a governmental agency by electing as the BMWD's board of directors their own employees and in using the governmental process for their own anticom-

petitive purposes and whether these actions fall within one of the recognized exceptions to antitrust liability.

A. *Noerr-Pennington* Exception to Antitrust Liability

The Court of Appeal erred in applying the *Noerr-Pennington* doctrine of immunity to the private party Respondents. The Court's decision herein presents a direct conflict to the legal issues raised.

This Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965) formulated the doctrine which exempts from federal antitrust laws "conduct of private individuals in seeking anticompetitive action from government." This doctrine rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not appropriate for application in the political arena." *Noerr.* The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive. However, under the factual situation of this case, Respondents are not attempting to influence government, they are the government.

Noerr recognized, however, what has come to be known as the "sham" exception to its rule. "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144, 81

S.Ct. at 533. The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process as opposed to the outcome of that process as an anticompetitive weapon. *City of Columbia citing, California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972).

The BMWD, controlled by the Respondents who can vote in its Board of Directors, is a far cry from the political independent decision maker which one would have a First Amendment right to lobby without fear of antitrust liability. *California Motor*, like the instant case, is different from *Noerr*, in that, the allegations are not that the Respondents sought to influence public officials, but that the Respondents sought to bar their competitors from meaningful access to District decisions regarding their use and sale of their surplus water and to usurp and use the government process of decision making. They did this by having their paid representatives, as Board members, delay and veto the sale of surplus water, and instituting unnecessary and exorbitant fees regardless of the merits of their actions in order to prevent Petitioners and like landowners from being able to financially afford to keep their businesses and land.

The Court of Appeals erred in finding the BMWD's actions were genuinely an attempt to influence governmental action. The undisputed facts show that Respondents made agreements to veto any sale of surplus water based upon their own plans to cause detriment and land loss to Petitioners and others. There was no benefit to the district and the alleged threat to future water supply is groundless. They instituted a baseless action to forestall the sale of surplus water without regard to the merits of future need for water. Respondents undertook these actions for their own benefit, and their actions were designed to delay Petitioners' ability to sell their (not Respondents') surplus water and disrupt Petitioners'

farming businesses by saddling them with onerous regulatory fees, costs and burdens.

The foregoing allegations and undisputed facts show Respondents undertook activity solely to delay or prevent Petitioners' ability to market their surplus water through the use of "the governmental process," as opposed to the outcome of that process, as an anticompetitive weapon. Respondents were not concerned with stopping Petitioners' warranted sale of their surplus water through government action but through the imposition of costs and burdens associated with the government process. Thus, Petitioners have stated a cause of action under the sham exception and the District Court and the Ninth Circuit erred in granting Respondent's dismissal.

B. *Midcal* Exception To Antitrust Liability

Although this court stated a state action exemption in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), it did not involve private conduct, subsequent case law has made it clear that private entities may claim state action immunity if their challenged activity was direct *and* supervised by the state. *Federal Trade Commission v. Ticor Title Insurance Co.*, 922 F.2d 1122, 112 S.Ct. 2169 (1992). "Private party conduct is immune from anti-trust liability under the State Action Doctrine only if the party claiming immunity shows that its conduct satisfies two requirements." *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear and affirmative policy to allow the anti-competitive conduct, *and* second, the State provides active supervision of anti-competitive conduct undertaken by private actors." (*See Ticor.*) There is a

close relationship between the two requirements: "Both are directed at ensuring that particular anti-competitive mechanisms operate because of a deliberate and intended state policy." *Id.*

The Court of Appeals in affirming the District Court erred in not addressing the second prong of private actor's immunity under the *Midcal* test. This Court held that the active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests, and no protection against the type of conduct complained of herein.

The purpose of the active supervision inquiry is not to determine whether the State of California has met some normative standard in its water code regulatory practices (*see Ticor*). Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the sale of surplus water have been established as a product of deliberate state intervention, not simply by agreement among private parties. It is clear from the facts alleged in the complaint and subsequent documents submitted that the California Water Code does not provide that the State review or achieve a level of supervision in the process of when or if there be a sale of surplus water. There is not even the mere potential for state supervision. In the absence of active supervision in fact, there can be no state action immunity for what were otherwise private arrangements not to sell surplus water, to the detriment of Petitioners.

This court, in *Ticor*, held that "Actual state involvement, not deference to private anti-competitive activity

under the general auspices of state law, is the precondition for immunity from federal law."

Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of the challenged activity. It is this "active supervision" prong of the state action immunity test which "prevents States from casting . . . a gauzy cloak of state involvement over what is essentially private anticompetitive activity." *Southern Motors Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 at 61 n. 23, 105 S.Ct. 1721 at 1729 n. 23 (1985), *quoting Midcal* 445 U.S. at 106, 100 S.Ct. at 943-44.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN FINDING THE BMWD'S CONDUCT IS NOT IN VIOLATION OF THE SHERMAN ANTITRUST ACT. THE COURT'S DECISION, AS APPLIED, IS TOO AMBIGUOUSLY SWEEPING WHEN APPLIED TO THE PROBLEM OF THIS CASE, WHICH IS WHETHER THE BERRENDA MESA WATER DISTRICT'S CONDUCT VIOLATES THE SHERMAN ANTITRUST ACT, 15 U.S.C. §§ 1 AND 2; AND IF SO, WHETHER ONE OF THE NARROW EXCEPTIONS TO THE ACT APPLIES.

A violation of the Sherman Act is established upon a showing of monopoly power in a relevant market, and that the party possessing the monopoly power has or intends to use such power to unreasonably restrict or eliminate competition in the market. *U.S. v. E.I. du Pont*

de Nemours & Co., 351 U.S. 377, 389-91, 76 S.Ct. 994, 1003-05 (1956); *Dimmitt Agri Industries, Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 525 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770 (1983).

The relevant market at issue in this case is the market of surplus water within the Berrenda Mesa Water District. BMWD's ability to sell surplus water within the District on the market is quite clear, and BMWD intended to exercise this power to eliminate competition for water from Petitioners and individual landowners by not selling the surplus water and charging unnecessary exorbitant fees, thus excluding those landowners. The BMWD attempts to justify its actions by stating that it does not exclude Petitioners and other smaller landowners, but rather only limits the sale of surplus water pursuant to the BMWD's independent analysis and decision. However, the evidence surrounding the Board's decision to limit and or not to sell surplus water is fatal to the Petitioners' and other individual district members' agricultural industry and landownership, and amounts to a de facto prohibition on the sale of surplus water. Both the intent and the effect of the Board's resolution, not to sell the surplus water was to put the smaller landowners out of business and to acquire ownership of their lands. These actions by the BMWD Board violate section 2 of the Sherman Act.

A. State Action Exemption

The District Court determined and the Court of Appeals agreed, *however*, that BMWD is exempt from enforcement of the Sherman Act, even if a violation exists. A "state action exemption," as pronounced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), may apply to a municipality when: (1) the state legislature has "clearly articulated and affirmatively expressed"

a state policy granting the municipality the power to legislatively displace competition within a particular regulated area; *and* (2) the municipality has not unreasonably exercised such authority. *Community Communication Co. v. City of Boulder*, 455 U.S. 40, 51-53, 102 S.Ct. 835, 841, (1982); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 409, 98 S.Ct. 1123 (1977).

1. Statutory Authority

In this case, the District relies on statutory authorization by the State of California to regulate and control the sale of surplus water within the Berrenda Mesa Water District. California Water Code § 35423.[4]

The statutory authority relied upon by the District Court and the Court of Appeals herein also reflects the State's desire to give exclusive regulatory power over the sale of surplus water. Although the statutes are not specific as to when a threshold of surplus water can be sold or the manner of regulation, such specificity is not required. Nor does the California Water Code contain a mandate to displace competition in the sale of water, but a mandate is not needed.

The State has clearly authorized the BMWD to regulate the sale of surplus water in its district, and the Court of Appeals correctly found that such authorization is

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[4] § 35423 Rules and regulations

A district may establish, print, and distribute equitable rules and regulations for the sale and distribution of water. A district may provide therein that water shall not be furnished to (1) persons who violate the rules and regulations or against whom there are delinquent water, standby, facility, or other charges, or penalties or interest on any such charges, or (2) land against which there is a delinquent assessment.

sufficient to satisfy the *Parker* requirement of "clearly articulated and affirmatively expressed" state policy. Additionally, the Court of Appeal correctly found that active state supervision is not required as to the District under *Town of Hallie v. City of Eau Claire*, 471 U.S. 4, 105 S.Ct. 1713 (1985).

The determination of the availability of *Parker* immunity therefore turns on whether the District has exercised such authority in a reasonable manner.

2. Unreasonable Exercise of Authority

This Court, in *Indep. Taxi v. Greater Houston*, 474 U.S. 903, 106 S.Ct. 231 (1985), addressed the issue of reasonableness in exercise of authority. The City of Houston was found immune from federal antitrust liability for unequal treatment of taxicabs at Intercontinental Airport. In that case, the City used its authority to entirely, rather than selectively, displace competition in the airport taxi business. *Santos v. City of Houston, Texas*, 852 F.Supp. 601, S.D. Tex. (1994). Its decision to enter into an exclusive contract arose as a result of an influx of taxicab service at the airport when it opened. *Id.* The City's actions were decisive, a legitimate goal was achieved, and the City's action in excluding other taxicab services was consistent and not arbitrary, *id.* (distinguishing *Indep. Taxi*).

Analogous to the instant case, the court in *Santos* found the City was in violation of antitrust laws in that an ordinance was not effectively achieving the City's alleged current objective, which is traffic safety, and was an unreasonable exercise of authority. The BMWD action in arbitrarily not selling surplus water is not achieving the current objective which is to act in the best

interest of the district and its members. California Water Code § 35425.[5]

Petitioner concedes that the BMWD has authority to regulate the sale of surplus water in the best interest of the district members. However, there is no evidence that there was a need to retain such surplus' of water and there is no evidence that the sale of this water would have posed a threat to the supply of water needed for future use. Quite the contrary, the surplus far exceeded the amount necessary to sustain the District's future needs.

The BMWD's reasoning is further diluted by its arbitrary resolution to not sell the surplus water after clearly finding the sale to be in the best interest of the district members. The BMWD, in this case, has selectively displaced competition without any reasonable basis. Arbitrary regulation, without any recognizable benefit to the District as a whole, is not a reasonable exercise of authority. Thus, the District is not immune from antitrust liability under the *Parker* doctrine.

The Court of Appeal's decision did not consider the reasonableness of the BMWD's conduct in not selling the surplus water, particularly in light of the fact that it caused the Petitioners to lose their land and their water allocations through foreclosure.

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[5] California Water Code § 35425.

If its board deems it to be for the best interests of the district, a district may enter into a contact for the lease, sale, or use of any surplus water not then necessary for use within the district, for use either within or without the district.

III.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITIONERS' COMPLAINT.

The Court of Appeals reviewed the dismissal of Petitioners' antitrust claims, taking the factual allegations made by Petitioners as true. Appendix "B".

In reviewing a Federal Rule of Civil Procedure 12 (b) (6) dismissal, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the non-moving party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). Dismissal of a complaint under Rule 12 (b) (6) is improper unless, "it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99-102 (1957) (emphasis added); *Love, supra.*

This court has made it clear that a court should dismiss under Rule 12 (b)(6) only in rare circumstances. For the following reasons this petition should be granted to reconsider the material facts and legal theories put forth to this court in the light of antitrust liability and its exceptions.

CONCLUSION

The Court of Appeals decision as to State action immunity is based upon a factual finding left undecided in prior Supreme Court decisions. This case presents an opportunity for this Court to address the undisputed factual issue of whether the state action immunity doctrine and its case law progeny insulates private parties

who control the Board of Directors of a Water District, from antitrust liability for predatory anticompetitive behavior and from using the governmental process, as opposed to the outcome of that process, and to bring much needed certainty and uniformity to this area of the California Water Code and similar statutes.

The Petition for a Writ of Certiorari should be granted.

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Respectfully Submitted,

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